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# Homosexual Public Employees: Utilizing Section 1983 to Remedy Discrimination

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Section 1983 of title 42 of the United States Code[1] was enacted as part of the Civil Rights Act of 1871[2] against the backdrop of the Reconstruction Era, and provides a statutory remedy for constitutional violations which occur under color of state law. Also known as the Ku Klux Klan Act, its legislative history reflects congressional concern for the plight of blacks and black sympathizers subjected to egregious discriminatory treatment in the post-civil war period.[3]

For nearly eighty years, 42 U.S.C. § 1983 remained a viable but seldom utilized tool to eradicate discrimination under color of state law and to recompense victims of such discrimination. In the 1960's a renewed campaign against discrimination in several sectors of society led to increased section 1983 litigation, including challenges to discriminatory employment practices. Legislative, as well as judicial, action in that decade led to greater protection for members of suspect classes,[4] without requiring a surrender of remedies allowed under section 1983.[5] Individuals of non-suspect clas-

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1. 42 U.S.C. § 1983 (Supp. 1980) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

3. *See, e.g.*, A. ALVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES (1967) for discussion of congressional debates.

4. *See, e.g.*, The Civil Rights Act of 1964, Pub. L. No. 88-352, § 701-718, *as amended* 42 U.S.C. § 2000e-2000e-17 (1976).

5. The Supreme Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) emphasized the independent nature of remedies provided by the Reconstruction

ses, such as homosexuals, have not had the benefit of extensive protective legislation. Although forty members of Congress have sponsored an amendment to Title VII which would prohibit discrimination on the basis of sexual preference, that legislation has failed to gain the support necessary for passage.[6]

Political activism of the homosexual community commenced in the summer of 1969, when over four hundred homosexuals gathered in the streets of Greenwich Village for several nights to protest police raids on the Stonewall Inn, a homosexual bar.[7] For these individuals, political activism has often led to legislative and social defeat. In 1978, New York City defeated legislation prohibiting housing and employment discrimination on the basis of sexual preference, and in 1979 the Connecticut House of Representatives followed suit.[8] Ordinances favoring gay rights have been repealed in Wichita, Kansas; St. Paul, Minnesota; Eugene, Oregon, and Dade County, Florida.[9] But homosexual activism has also enjoyed its successes. The District of Columbia and Minneapolis are among the thirty-nine cities, towns and counties that have enacted anti-discrimination ordinances.[10] In November of 1978, in California, homosexuals and supporters of homosexual rights defeated by a three-to-two margin a proposition which would have permitted school boards to fire openly homosexual teachers.[11] As a result, the debate surrounding employment of homosexuals is currently more open and more controversial than ever before in this nation's history. And the legislative processes have, at best, moved slowly, often prodded by judicial action which protects and secures individual rights while chastising legislative sloth or inflexibility. For instance, the Civil Service Commission removed a blanket disapproval of hiring homosexuals in a 1973 bulletin as a result of federal litigation in cases such as *Norton v. Macy*.[12] In the absence of legislative guidelines, some segments of society, such as corporate entities and universitites, have established their own guidelines

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Civil Rights Acts and Title VII. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McNeese v. Board of Educ., 373 U.S. 668 (1963).

6. *See* H.R. 166, 94th Cong., 1st Sess., 121 CONG. REC. 8581 (1975).
7. *See How Gay is Gay?*, TIME, Apr. 23, 1979, at 72.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 73.
12. 417 F.2d 1161 (D.C. Cir. 1969).

and policies to deal with the homosexual applicant or employee. AT&T and IBM are among the major corporations that honor a policy prohibiting discrimination in hiring or promotion based on sexual preference.[13] Harvard Law School prohibits firms that discriminate against homosexuals from utilizing its placement services.[14]

While legislators have, in large measure, indicated their reluctance to deal with this controversial issue, judges have been, and will likely continue to be, instrumental in dealing with employment discrimination regarding homosexuals. This combination of legislative inaction and political activism on the part of homosexuals has and will lead to more extensive litigation in this area. Because revitalization of the Civil Rights Act of 1871 has not been limited in application to suspect class members,[15] section 1983 provides the homosexual applicant or employee with a direct and readily applicable tool that cuts swiftly to the heart of public employment discrimination.

By its terms, section 1983 is limited to public employment cases in which a state action element is present, and it affords protection for United States citizens and aliens within the jurisdiction of the United States. Section 1983 prohibits any person from "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[16] The party injured may pursue legal or equitable action for redress.[17] The doctrine of governmental immunity, which previously had the effect of blunting section 1983's usefulness, was re-examined in *Monell v. Department of Social Services*,[18] which duly circumscribed the immunity accorded municipalities.[19]

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13. TIME, Apr. 23, 1979, at 73.

14. *Id.* at 75.

15. *See, e.g.*, Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546 (E.D. N.Y. 1977), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977); Gurmankin v. Constanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d. Cir. 1977).

16. 42 U.S.C. § 1983 (Supp. 1980).

17. *Id.*

18. 436 U.S. 658 (1978).

19. *Id.* at 700-01: "[T]he overruling of *Monroe* insofar as it holds that local governments are not 'persons' who may be defendants in § 1983 suits is clearly proper. It is simply beyond doubt that, under the 1871 Congress' view of the law, were § 1983 liability unconstitutional as to local governments, it would have been equally unconstitutional as to state officers. Yet everyone . . . knew that § 1983 would be applied to state officers and nonetheless stated that § 1983 was constitutional . . . [T]here can be no doubt that § 1 of the Civil

One of the most litigious and interesting aspects of a section 1983 action for employment discrimination involves examination of the protectable interests which a party can assert. A particular interest asserted by an individual will, in large measure, determine not only whether he will be awarded relief, but also what form of relief he will receive and what particular test or analysis the court will apply to his case. Homosexual litigants have asserted interests ranging from the right of association and speech to property rights and the right of privacy embodied in the liberty aspect of the Fourteenth Amendment.[20] This article will examine the interrelationship of the protected interests which the homosexual litigant may raise and the standards against which the courts measure agency action.

## I. Norton v. Macy: The Nexus Requirement

*Norton* involved the removal of a protected[21] federal employee from his post as a budget analyst for the National Aeronautics and Space Administration (NASA) in 1963 for off-duty, homosexual conduct. Morals officers observed Norton pull his car to a curb, pick up one Procter, drive around the block once, and drop Procter off at the pickup point. Both individuals were arrested, possibly after Procter informed police that Norton felt his leg and invited him to Norton's apartment. Two hours of interrogation regarding sexual history followed, a portion of which was monitored incognito by NASA's security chief. Upon release, Norton was taken to a deserted NASA building by the security chief and further interrogated. During the interrogation at NASA, Norton allegedly admitted that he had engaged in homosexual activity during his high school and college days, and that he may have engaged in homosexual activity twice during blackout periods, after drinking. He allegedly admitted to having blacked out after meeting Procter.

In his formal reply to the notice of proposed dismissal, Norton

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Rights Act was intended to provide a remedy . . . against all forms of official violation of federally protected rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the 'persons' covered by § 1."

20. *See* U.S. CONST. amend. XIV.

21. The appellant, as a veteran, enjoyed extraordinary civil service protection afforded by the Veterans' Preference Act, 5 U.S.C. § 7512(a) (1976). *See* 417 F.2d at 1162.

denied his homosexual status, his knowing participation in homosexual activity as an adult, and making a homosexual advance to Procter. NASA accepted Procter's contention that the homosexual advance had occurred and found Norton unsuitable for retention as a government employee because he engaged in "infamous . . . , immoral, or notoriously disgraceful conduct."[22] NASA's action was upheld upon agency review.[23]

Norton filed an action in district court contending that his dismissal violated the constitutional mandate of due process.[24] The Civil Service Commission's motion for summary judgment was granted,[25] but on appeal, the Court of Appeals for the District of Columbia Circuit held that Norton was unlawfully discharged.[26] The court of appeals accepted the lower court's finding that a homosexual advance occurred, and framed the issue in terms of whether the homosexual advance or Norton's personality traits as evidenced in the record constituted "such cause [for removal] as will promote the efficiency of the service."[27]

The court first examined its authority to review the agency determination by defining the constitutional limits of such a discretionary determination. While the government, as employer, has substantial discretion in determining bases for removal, the removal must comport with both procedural and substantive due process limitations.[28] Substantively, due process forbids removal for arbitrary and capricious reasons.[29] These substantive limitations are more expansive when the removal action results in affixing a stigma to the employee or intruding upon his right to privacy.[30] In contrast to procedural due process limitations, the substantive limitations apply with equal force to protected and unprotected employees.[31] The court thus recognized the need for judicial review of allegations that the employer's removal action was

22. 5 C.F.R. § 731.201(b) (1975).
23. 417 F.2d at 1163.
24. *Id.* at 1163-64.
25. *Id.*
26. *Id.* at 1168.
27. *Id.* at 1163.
28. *See id.* at 1164.
29. *See id.* (citing Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) and Wieman v. Updegraff, 344 U.S. 183 (1952)).
30. *See* 417 F.2d at 1164.
31. *See id.*

unreasonable in that there was no rational basis for the conclusion that the removal in question promoted service efficiency.

Although the government could find Norton's conduct "immoral" when viewed against the prevailing standards of society, this finding, standing alone, was, for two reasons, an insufficient basis for dismissal in the absence of a showing that "all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service."[32] First, "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."[33] Second, "the statute precludes [the government] from discharging protected employees except for a reason related to the efficiency of the service."[34]

On the basis of this due process analysis, the court concluded that charges against Norton required NASA to prove a nexus between Norton's off-duty conduct and actual or probable impairment of service efficiency in order to justify Norton's dismissal.

The court distinguished the earlier case of *Dew v. Halaby*,[35] on the grounds that Norton, unlike the plaintiff in *Dew*, was a longtime employee who did not occupy a sensitive position. However, the court noted the finding in *Dew*, that homosexual conduct could impair service efficiency. Homosexual conduct which evidences an unstable personality, provokes adverse reactions from personnel with whom the homosexual worker must interact, or renders the homosexual subject to blackmail may supply a nexus which, in some instances, will justify dismissal.[36] These factors were admittedly absent in *Norton*, leaving only custom and potential agency embarrassment to supply a connection between Norton's conduct and service efficiency.[37]

It is the government who has the burden, in a *Norton* situation, of establishing a specifc nexus between employee conduct and service efficiency: "A reviewing court must at least be able to dis-

32. *Id.* at 1165.
33. *Id.*
34. *Id.*
35. 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed by agreement of the parties*, 379 U.S. 951 (1964).
36. *See* Norton v. Macy, 417 F.2d at 1166.
37. *Id.* at 1167.

cern some reasonably forseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service."[38] Once this nexus has been established, the substantive aspect of due process is satisfied, and the agency is then free to determine whether service efficiency is best furthered by dismissal of the employee.[39]

In *Norton,* the government failed to meet its burden of establishing this nexus, and thus its dismissal was held to be arbitrary. The court noted that "on the record . . . [Norton] is at most an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public. Thus, even the potential for the embarrassment the agency fears is minimal."[40]

Although *Norton* involved a due process assault on the government's attempt to dismiss an alleged homosexual, it also raised matters of vital importance to section 1983 litigants. *Norton* established the existence of substantive due process limitations that correlate with the protected interests assertable by homosexual litigants who are public employees, and reaffirmed the judiciary's role in assuring agency compliance with these limitations.

The *Norton* court recognized the need for expansive due process limitations where adverse employment action has the impact of stigmatizing an individual and thus affecting his opportunity to pursue a legitimate livelihood. It reaffirmed the existence of a sacrosanct sphere of privacy in the off-duty lives of public employees. Absent a clear area of intersection between the employee's on-duty and off-duty lives, there is no nexus to support an adverse employment action. Finally, *Norton* established the rational basis test as a device to measure the discretionary adverse employment action taken by an agency.[41]

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Norton* states: "In other cases, we have recognized that, besides complying with statutory procedural requirements, the employer agency must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service.' " *Id.* at 1164 (footnote omitted). As a practical matter, the factual and legal analysis in *Norton* followed this rational basis standard.

## II. Protected Interests

> The § 1983 plaintiff must be prepared to show that he has been acted against for a constitutionally prohibited reason, or under a constitutionally repugnant standard, or for no reason whatsoever.[42]

Adverse employment actions directed against public employees or applicants may result in deprivation of property and/or liberty interests.[43] Among the protected interests a homosexual litigant may assert in section 1983 actions are property, reputation, due process, equal protection, speech and association, and privacy. The interest which the litigant asserts will determine the availability and nature of relief afforded by the courts. For example, successful assertion of a property right in employment may afford a reinstatement remedy, but not a grant of backpay where the litigant successfully asserts a constitutional deprivation.[44] In addition, the protected interest the litigant asserts may determine the framework for the court's analysis and the standard against which agency action is measured.[45]

In similar fashion, the homosexual litigant's status may be determinative of the protected interests he can assert. A tenured teacher could assert a property interest in continued employment,[46] but the applicant for a teaching position would be limited to asserting deprivation of a liberty interest.[47]

### A. Property Rights

Litigation involving property rights normally emphasizes pro-

42. Wishart v. McDonald, 500 F.2d 1110, 1115 (1st Cir. 1974).

43. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court stated: "There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case." *Id.* at 573. *See also* Slochower v. Board of Educ., 350 U.S. 551 (1956).

44. *Compare* remedies awarded in Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254 (D. Or. 1973), *aff'd on other grounds*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975), and Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

45. *Compare* the nexus requirement in *Norton* and Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) *with* the balancing test in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) and Pickering v. Board of Educ., 391 U.S. 563 (1968).

46. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1972).

47. *See, e.g.*, McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

cedural due process infringements. However, a bona fide property right to continued employment is also important, as it may be the only constitutionally protected right the homosexual public employee litigant can assert. Alternately, the nature or existence of a property right may be determinative of the remedy the court affords.

A definitive property interest in continued employment may be established through an actual statutory or regulatory tenure system.[48] Tenure in the teaching profession, for example, may be based on state statutes prescribing licensing or tenure requirements or internal university regulations or policy statements establishing tenure requisites.[49] In addition, an individual may achieve tenure and, thus, obtain a constitutionally protected property interest based on a non-regulatory or *de facto* system. In *Perry v. Sindermann*,[50] the Supreme Court recognized the merit of such a claim.

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48. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

49. *Compare* the tenure policies of the state of Texas and Odessa College, the effects of which were at issue in *Perry*. The State's policy statement read:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

. . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities." 408 U.S. at 600-01 n.6 (quoting from the Coordinating Board of the Texas College & University System, *Policy Paper 1* (Oct. 16, 1967)).

Odessa College's policy statement read: "Teacher Tenure: Odessa College has no tenure system. The administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." 408 U.S. at 600.

50. 408 U.S. 593 (1972).

> A teacher, . . . who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. . . . [T]here may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. . . .
>
> [R]ules and understandings, promulgated and fostered by state officials, . . . may justify his legitimate claim of entitlement to continued employment absent "sufficient cause."[51]

A property right, at its minimum, must be based on a mutual agreement giving rise to a reasonable, that is objective *versus* subjective, expectation of continued employment.[52] Because property rights are created by sources external to the Constitution, the litigant asserting such an interest must be familiar with the external source that determines the scope of his tenure rights. The Constitution affords protection only for the scope of the property rights substantively defined by the external source.[53] In *Bishop v. Wood*,[54] the Supreme Court adopted the plurality opinion of *Arnett v. Kennedy*[55] and found there was no deprivation of a property interest protected by the Fourteenth Amendment.

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. . . . Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.[56]

In *Bishop*, because North Carolina law specified that an employment contract of indeterminate length was terminable at the will of either party, the Supreme Court found the plaintiff's employment terminable at will, thus affording no definitive property interest.[57] Therefore, the courts will disregard the external sources'

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51. *Id.* at 602-03.

52. *See Roth:* "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." 408 U.S. at 577. *Perry:* "We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process. . . . " *Id.* at 603. *See also* Connell v. Higginbotham, 403 U.S. 207 (1971).

53. *See* Board of Regents v. Roth, 408 U.S. at 577.

54. 426 U.S. 341 (1976).

55. 416 U.S. 134 (1974).

56. 426 U.S. at 344-45.

57. *Id.* at 345-47.

delineation of the property right only if it is contrary to constitutional standards.[58]

For public employees who work directly for the federal or state government, tenure is usually stated in terms of a prohibition of dismissal or discipline except upon a showing of cause.[59] *Norton* clearly established the proposition that the federal government has the burden of proving a nexus between an employee's performance on the job and his homosexuality, if that sexual preference is being used as a basis for adverse action *and* the employee possesses a right to continue in his job.[60] Thus, due process encompasses not only procedural, but also substantive safeguards, specifically against arbitrary and capricious action by the agency employer. The judiciary has extended the nexus requirement in *Norton* to public personnel cases in the state sector, thus affording protection against arbitrary and capricious action for state employees whose tenure rights are stated in terms similar to those in *Norton.*[61]

For employees of state agencies such as school boards, the "for cause" requirement may either be stated in terms of a prohibition similar to the regulation in *Norton,* or as a positive grant of dismissal authority for specific reasons, such as immorality or criminal conduct.[62] However, as in *Norton,* attaching a label to the conduct or the individual does not suffice to relieve the agency of its duty to establish the necessary nexus.[63]

The nexus requirement provides, in effect, substantive due process. The nexus requirement may be asserted either as a separate substantive right to due process (as in a liberty interest case) or it may be cited as the standard by which the deprivation of a property interest is to be judged.[64] In the latter context, the exter-

58. *See id.* at 350.

59. *See, e.g.,* Norton v. Macy, 417 F.2d 1161, 1163. *Compare* the language of the regulation in *Norton with* that in Safransky v. State Personnel Bd., 62 Wis. 2d 464, 474, 215 N.W.2d 379, 384 (1974).

60. 417 F.2d at 1167.

61. *See, e.g.,* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977); Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974).

62. *See, e.g.,* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

63. *See, e.g.,* Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), *appeal after remand,* 402 F.2d 644 (D.C. Cir. 1968); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 230, 461 P.2d 375, 386, 82 Cal. Rptr. 175, 187 (1969); *contra,* Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977).

64. *See* notes 106-71 and accompanying text *infra.*

nal source assumes importance in light of *Bishop's* holding that the external source defines the substantive scope of employment rights. The *Norton-Bishop* situation, in which the external source delineates specific bases upon which just cause may be found, is relatively common. The importance of the external source and its relationship as a measuring standard for a nexus was illustrated in *Morrison v. State Board of Education,*[65] where the State Board of Education sought to revoke Morrison's lifetime teaching certificate. In *Morrison,* the court found that such general terms as moral turpitude and unprofessional conduct in "[l]egislation authorizing disciplinary action against the holders of a variety of certificates, licenses and government jobs" drew their "precise meaning by referring in each case to the particular profession or the specific government position to which they were applicable."[66] Thus, the nexus was expressed in terms of the adverse impact an individual's homosexual conduct had upon his particular job.

The attempted revocation of Morrison's teaching certificate was predicated upon a finding that his participation in a homosexual relationship was indicative of "immoral and unprofessional conduct and acts involving moral turpitude."[67] The court examined numerous licensing and employment cases involving interpretation of broad terms such as "unprofessional conduct."[68] The court's approach in previous situations was cognizant of the fact that, "[i]n using [these general terms] the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval; [h]ence the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on

65. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). Although *Morrison* involved license revocation, the courts have specifically applied its analysis to adverse employment actions directed against homosexual state sector employees.

66. *Id.* at 220, 461 P.2d at 379, 82 Cal. Rptr. at 179.

67. *Id.* at 217, 461 P.2d at 377, 82 Cal. Rptr. at 177.

68. *Id.* at 220-24, 461 P.2d at 379-82, 82 Cal. Rptr. at 179-82 (discussing Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966); Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953); Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951); Board of Trustees v. Owens, 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962); Jarvella v. Willoughby-Eastlake City School Dist., 12 Ohio Misc. 288, 233 N.E.2d 143 (1967)). *See also* Morrison v. State Bd. of Educ., 1 Cal. 3d at 227-28 n.21, 461 P.2d at 385 n.21, 82 Cal. Rptr. at 185 n.21.

the job, the employee has disqualified himself."[69] The court expressed concern that the standard of conduct reflect a rather stable consensus regarding the nature of adverse conduct that could impact upon the relationship between a specific teacher and his students or co-workers. "No such consensus can be presumed about 'morality.' "[70]

In conclusion, the court held that "the Board of Education cannot abstractly characterize the conduct in this case as 'immoral,' 'unprofessional,' or 'involving moral turpitude' within the meaning of section 13202 of the Education Code unless that conduct indicates that the petitioner is unfit to teach."[71] The standard which the court set for determining unfitness to teach was "a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher."[72]

As in the *Norton* case, the Supreme Court of California noted general factors which may be considered in determining fitness to teach and applied those factors to the specific facts in *Morrison.*

> [T]he board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.[73]

Applying these factors to *Morrison,* the court found that unfitness to teach was not demonstrated. Morrison had engaged in a limited and noncriminal homosexual relationship with another man approximately six years prior to the license revocation. The evidence demonstrated that Morrison had engaged in no subsequent homosexual conduct, that the incident had not adversely af-

69. *Id.* at 225, 461 P.2d at 382, 82 Cal. Rptr. at 182.
70. *Id.* at 226, 461 P.2d at 383, 82 Cal. Rptr. at 183.
71. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.
72. *Id.* at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.
73. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.

fected his working relationship with other individuals at the school, that his "motives at the time of the incident involved neither dishonesty nor viciousness, and [that] the emotional pressures on both petitioner and Schneringer suggest[ed] the presence of extenuating circumstances."[74] There was no evidence that "petitioner's conduct in any manner affected his performance as a teacher. . . . [or] that petitioner had ever attempted, sought, or even considered any form of physical or otherwise improper relationship with any student. . . . [or] that petitioner had failed to impress upon the minds of his pupils the principles of morality."[75] Finally, there was an absence of notoriety.[76]

The license revocation and adverse employment action cases which have followed *Morrison* have largely adhered to the factor analysis delineated in that case.[77] Although no single specific factor has emerged as a primary determinant regarding nexus, certain factors have been cited with great frequency. These include absence or presence of notoriety connected with the conduct, whether the act was committed in a public or private arena, whether or not the conduct constituted a crime, the presence or absence of advocacy as relates to homosexual conduct or homosexuality as a way of life and whether or not homosexual overtures or statements occurred in the job setting.[78] Unfitness to teach (or unfitness to perform any specific job) is an issue of fact,[79] and a review of cases in this area reveals no standard formula for weighing the significance of specific factors. There exists no generalized rule of law in this area, but rather the courts engage in an *ad hoc* determination on the basis of all of the facts in any specific case.[80]

Substantively, the nexus requirement imposed in a property

74. *Id.* at 237, 461 P.2d at 392, 82 Cal. Rptr. at 192.

75. *Id.*

76. *Id.* at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.

77. *See, e.g.*, Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977); Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972); Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971); Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974).

78. *See* cases cited in note 77 *supra*. For further discussion of the factor analysis, *see generally* Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442 (1973).

79. *See* Board of Educ. v. Jack M., 19 Cal. 3d at 698 n.3, 566 P.2d at 605 n.3, 139 Cal. Rptr. at 703 n.3.

80. *See Sexual Conduct as Ground for Dismissal of Teacher or Denial or Revocation of Teaching Certificate*, Annot., 78 A.L.R.3d 19, § 2[a] (1977).

interest case parallels that in a liberty interest case. A blanket policy of adverse action based solely on homosexual status will not supply the nexus and, in fact, raises constitutional issues of First Amendment magnitude.[81] Homosexual conduct may provide an adequate nexus to support adverse action only if the conduct impacts upon job performance, service efficiency or other criteria utilized in the external source to define the scope of the protected property right.[82] As *Norton* intimated, the assertion of a property interest alone will result in judicial application of a nexus requirement similar in scope to the rational basis test utilized in contexts other than public personnel law.[83] However, property interests are often asserted in conjunction with other protected interests in homosexual public employee cases. In this regard, when a fundamental or core right secured by the Constitution is coupled with a contractual property interest, the nexus test may approach the compelling state interest test.[84] The assertion of a property interest in that context then becomes significant from the standpoint of remedies. *Burton v. Cascade School District Union High School No. 5*[85] is an example of the importance that such an assertion of property rights assumes.

*Burton* involved the dismissal of a non-tenured high school teacher for homosexuality. The mother of a high school student

81. This was recognized in Acanfora v. Board of Educ., 359 F. Supp. 843, 853 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974): "The Board of Education's policy of not knowingly employing any homosexuals is objectionable." *Id.* at 853.

82. *See, e.g.*, Morrison v. State Bd. of Educ., 1 Cal. 3d at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186; Safransky v. State Personnel Bd., 62 Wis. 2d at 474, 215 N.W. 2d at 384.

83. *E.g.*, Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974). "Courts of other jurisdictions have required . . . a showing of a sufficient *rational connection* or nexus between the conduct complained of and the performance of the duties of employment." *Id.* at 474, 215 N.W.2d at 384 (footnote omitted, emphasis added).

84. In a case involving a teacher's sexual conduct of a non-homosexual nature, rights of privacy and association were asserted in conjunction with the contractual property right. Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973). The district court in ordering reinstatement stated: "Similarly, to justify a dampening of the rights of assembly or association and privacy the state in the present case must show that the termination of the teacher's contract was caused by conduct which *'materially and substantially'* interfered with the school's work or rights of students, and 'undifferentiated fear or apprehension' of such interference is not enough. In the present case the state has failed to show any actual interference by Mrs. Fisher's conduct with any interest of the state in its educational endeavors." 346 F. Supp. at 401 (emphasis added).

85. 353 F. Supp. 254 (D. Or. 1973), *aff'd on other grounds*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

informed the principal that Burton was a homosexual. The case involved no allegations of homosexual advances toward students or dereliction of duties. The school board, after Burton acknowledged that she was a practicing homosexual, terminated her contract pursuant to an Oregon statute which permitted dismissal of a teacher during a contract period for "immorality."[86] The court found that the statute was unconstitutionally vague as it failed to provide adequate warning of prohibited conduct.[87] In a footnote, the district court noted that the Oregon statute posed a serious constitutional problem because it failed to require a nexus between the employee's conduct and teaching performance.[88]

Burton appealed the district court's denial of her request for reinstatement. The Ninth Circuit Court of Appeals upheld the substantive findings of the district court and discussed at length the impact of a property right on the remedy of reinstatement.[89]

> [Burton] was granted full pay for the loss resulting from the wrongful termination of her one-year contract. And although the parties have stipulated that Ms. Burton was an "adequate teacher," we cannot say that her chances of reemployment were such as to warrant our finding the same type of "property interest" in reemployment which might require reinstatement of a tenured teacher, or one under longer-term contract with the district. We hold only that, given the speculative nature of any expectation of reemployment appellant may have had, the district judge's award of an additional year's salary (above and beyond the backpay award for the unserved portion of her original contract) seems generous, and well within the lower bounds of his remedial discretion.[90]

Thus, the homosexual's assertion of a property interest in a section 1983 case may reflect deprivation of a constitutionally protected right subject to remedy. Or, assertion of this interest in conjunction with a liberty interest may provide the basis for seeking remedial recourse in the nature of reinstatement. Property and liberty interests have been merged even beyond this remedial intersection by judicial interpretation of the interest an individual has in his character and reputation.

86. 353 F. Supp. at 254.
87. *Id.* at 255.
88. *Id.* at n.1.
89. 512 F.2d 850 (9th Cir. 1975).
90. *Id.* at 853.

## B. Stigma and Reputation

The Supreme Court's analysis of procedural due process prerequisites to adverse action by state officials in *Wisconsin v. Constantineau*[91] intimated the existence of, at the very least, a fringe liberty interest in one's reputation, honor and integrity.[92] Through years of litigation, the Supreme Court has circumscribed this concept of a substantive property interest in reputation so narrowly that only a small class of litigants can assert a valid action for government conduct that effectively stigmatizes them. The Court's suggestion in *Board of Regents v. Roth*,[93] that adverse employment action could impact upon either of two constitutionally protected interests—reputation *or* the ability to practice one's chosen profession—merged in *Paul v. Davis*.[94]

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. . . . [95]

The ultimate effect of *Paul*'s requirement that an interest in addition to that of reputation be adversely affected is to limit the use of the stigma doctrine to public personnel cases involving tenured individuals. Adverse employment action against a public employee without tenure and its attendent property interest obvi-

91. 400 U.S. 433 (1971).

92. "[W]here the State attaches 'a badge of infamy' to the citizen, due process comes into play. . . . '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'. . .

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Id.* at 437 (citations omitted).

93. 408 U.S. 564 (1972).

94. 424 U.S. 693 (1976).

95. *Id.* at 701.

ously imposes no change in the individual's status. The fact that he loses a specific job or is denied that job does not automatically foreclose his ability to practice his chosen profession. Only in the most egregious and unusual instance will dismissal or failure to hire have this result.[96] The tenured employee, on the other hand, loses his job, his status as a tenured individual, and possibly the right to another position with the government (along with the wide range of benefits that inure to the public employee) when he is dismissed. Thus, judicial application and construction of the stigma concept, which had its roots in liberty, has transformed it into a hybrid of property and liberty interests in the context of public personnel actions.

In addition to the *Paul* requirement, which places the burden of proof on the plaintiff, the plaintiff must allege and prove that the label or allegation leading to the adverse action is false,[97] and that public dissemination has taken place.[98] These requirements are particulary anomalous in the context of litigation by the homosexual employee. First, it is often the fact of notoriety which provides the vital link justifying the agency's decision for adverse action to promote service efficiency. Second, the homosexual litigant cannot, in good faith, assert falsity. Yet, the stigma in a homosexual employment case does not arise from the label of homosexuality, but rather from the imputation that the individual is incompetent, or is incapable of satisfactory job peformance, or is promoting agency inefficiency simply because he is homosexual. It is not the litigant's status as a homosexual which is false, but rather it is the finding of just cause for dismissal based upon the homosexuality.

In assessing what constitutes stigmatizing information, the courts have chosen to follow precedent rather than to formulate specific guidelines. The courts have uniformly held that imputation of criminal or immoral conduct stigmatizes a person.[99] An alle-

96. *See, e.g.*, Cato v. Collins, 539 F.2d 656 (8th Cir. 1976); Giordano v. Roudebush, 448 F. Supp. 899 (S.D. Iowa 1977).

97. *See* Codd v. Velger, 429 U.S. 624, 627 (1977).

98. *See* Bishop v. Wood, 426 U.S. at 348-49.

99. *See, e.g.*, United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); Burdeau v. Trustees of Cal. State Colleges, 507 F.2d 770 (9th Cir. 1974). These and other cases quote heavily from Board of Regents v. Roth, 408 U.S. at 573, which states: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality."

gation of incompetence is rarely held to be stigmatizing. In *Stretten v. Wadsworth Veterans Hospital*,[100] a case involving the dismissal of a pathologist from a residency program, the court found that an imputation of incompetence was not stigmatizing since it affected the physician's reputation only within the professional sphere. More recently, another court in *Giordano v. Roudebush*,[101] found that allegations of incompetence—whether they remain within the sphere of one's professional community or extend to the community at large—may constitute stigmatization of constitutional dimensions.[102] Because Dr. Giordano's status was that of a probationary employee, he was not entitled to reinstatement and, under ordinary circumstances, had no legitimate claim beyond the right to an agency hearing to clear his name.[103] However, the Veterans Administration's action effectively foreclosed his ability to secure permanent employment between the dates of his dismissal and agency hearing; therefore, he was awarded backpay for that period of time.[104]

As in the case of Dr. Giordano, the probationary employee or the applicant suffers most from the stigmatizing label of incompetence or unfitness; yet, this is the very individual for whom relief is most often denied. The teaching profession provides an apt example of the manner in which these principles operate. A teacher without tenure rights and the concomitant expectation of continued employment may be dismissed for private, consensual homosexual acts with an adult. In most states, to attain tenure and a permanent certificate as a teacher, the individual must teach a certain number of years at specified grade levels. The refusal of school boards to hire or to retain the homosexual teacher gives rise to his inability to find or retain employment. This ultimately forecloses his ability to gain tenure and to obtain a permanent license to practice his chosen profession.

To date, the judiciary has failed to recognize this pattern as the result of branding the non-tenured teacher or other public employee with a badge of infamy. Yet, this is precisely the form that racial discrimination took for years as many unions which exer-

100. 537 F.2d 361 (9th Cir. 1976).
101. 448 F. Supp. 899 (S.D. Iowa 1977).
102. *Id.* at 906.
103. *Id.*
104. *Id.* at 909.

cised actual or *de facto* control over the construction industry refused to hire blacks who failed to meet their qualifications while they maintained systems to assure that blacks never attained proper qualifications for union hiring.[105] This pervasive and circuitous discrimination may be just as destructive of constitutional rights and human dignity as overt discrimination in hiring.

The non-tenured employee or applicant has, at best, a minimal chance of securing relief on the basis of stigma. For such individuals, relief pursuant to section 1983 may be grounded on a finding that due process or equal protection have been violated or that a "pure" liberty interest such as speech or privacy has been transgressed.

## C. Status/Classification

> [A] homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional manner. He is as much entitled to the protection and benefits of the laws and due process fair treatment as are others . . . .[106]

Principles of due process and equal protection come into play when the federal or state government, as employer, seeks to classify applicants or employees on the basis of homosexual status or conduct. As previously shown, the nexus requirement protects the tenured employee in the federal and state sectors by providing the requisite due process. In recent years, applicants, probationary employees and other non-tenured individuals have directed arguments toward injecting this nexus requirement into the scheme of due process protection to which they are entitled.

The Civil Service Commission's blanket policy of disqualifying all persons who engaged in or solicited others to engage in homosexual acts was attacked by an organization of homosexuals in *Society for Individual Rights, Inc. v. Hampton.*[107] The plaintiff had been discharged for his homosexual status on the Commission's assumption that employment of a homosexual would result in public

105. *See, e.g.*, United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

106. McConnell v. Anderson, 316 F. Supp. 809, 814 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

107. 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975).

contempt for the agency.[108] Plaintiff's homosexual status was revealed through a routine investigation which uncovered his general discharge from the Army for admitted homosexuality. The court ordered class relief as follows:

> [F]orthwith cease excluding or discharging from government service any homosexual person whom the Commission would deem unfit for government employment solely because the employment of such a person in the government service might bring that service into the type of public contempt which might reduce the government's ability to perform the public business with the essential respect and confidence of the citizens which it serves . . . .[109]

The court relied heavily on *Norton* and found that the Commission had the burden of proving that discharge for immoral behavior "*actually* impairs the efficiency of the service."[110] Presumably, the decision was based on due process grounds, since the court found that the Commission's policy as stated in the *Federal Personnel Manual* was faulty for overbreadth.[111]

In response to this decision, the Commission issued a bulletin on December 21, 1973, prohibiting those engaged in suitability evaluations from making a determination of unsuitability based *solely* on homosexual status, admission of homosexual acts, or the determination that employment of such an individual might result in public contempt for the agency.[112] Effective July 25, 1975, Civil Service Regulations were amended to reflect the impact of the opinion in *Society for Individual Rights, Inc.*, and the word "im-

108. 63 F.R.D. at 401.

109. *Id.* at 402.

110. *Id.* at 401 (emphasis added).

111. The challenged section read: "*Homosexuality and sexual perversion*—Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for public employment. In acting on such cases, the Commission will consider arrest records, or records of conviction for some form of homosexuality or sexual perversion; or medical evidence, admissions, or other credible evidence that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the grounds of immoral conduct." *Id.* at 400 n.1.

112. "Accordingly, you may not find a person unsuitable for federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service."

moral" was deleted from the list of disqualifying reasons.[113] The *Suitability Guidelines for Federal Employment* regarding the determination of *Infamous or Notoriously Disgraceful Conduct* was amended to read:

> Individual sexual conduct will be considered under the guides discussed above. Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction, while the person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such a person's sexual conduct affects job fitness.[114]

*Society for Individual Rights, Inc.,* raises two important implications regarding overbreadth and due process. First, by finding that the federal government's regulation was overbroad, *Society for Individual Rights, Inc.,* implied that the regulation encompassed protected rights and activity, as well as unprotected activity. *Society for Individual Rights, Inc.,* made no attempt to delineate what the core of protection involved was, but it opened the door to the assertion that federal employment cannot be denied to individuals who can show that such rights as association, speech and privacy have been unnecessarily invaded by a prohibition of employment based on homosexual status or conduct, absent a nexus between the status or conduct and the individual's job performance or the agency's job efficiency. As in *Norton, Society for Individual Rights, Inc.,* placed the burden of proof on the government.[115] The second implication is that, even in the absence of regulations specifying generalized bases for discharge or failure to hire, due process requires a nexus between status or conduct and job performance or service efficiency. After *Society for Individual Rights, Inc.,* mere assertion of homosexual status or conduct, absent proof of an *actual* impact on job performance or agency efficiency, is so irrational as to be violative of due process.

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113. 5 C.F.R. § 731.202(b)(2): "Criminal, dishonest, infamous or notoriously disgraceful conduct" (1980).

114. Federal Personnel Manual Supplement (Letter) 731-3, app. 2, pt. B.3.

115. *See* 63 F.R.D. at 401.

In the wake of *Society for Individual Rights, Inc.*, the federal government's regulations now afford applicants and other individuals without tenure, as well as those with a valid property interest in employment, a right to employment free from the unconstitutional condition imposed by irrational classifications. The homosexual litigant's due process argument may be grounded on the general terms of the statute or regulation, as it was in *Society for Individual Rights, Inc.*, or it may be grounded on the agency's determination and action. Thus, even where legislation specifies general terms such as "immoral conduct" or "unprofessional conduct" as a basis for dismissal or non-hiring, and this legislation can be construed to pass constitutional muster, the court may look behind the language in the legislation to examine the agency's application of the standards. This is what occured in *Singer v. United States Civil Service Commission.*[116]

Singer was a probationary status clerk-typist who challenged his dismissal on the basis that the agency's determination and action was improper and arbitrary or capricious. Citing *Toohey v. Nitze,*[117] the court summarized the scope of review accorded agency action as follows:

> "Dismissal from federal employment is largely a matter of executive agency discretion. Particularly is this true during the probationary period. The scope of judicial review is narrow. Assuming that statutory procedures meet constitutional requirements, the court is limited to a determination of whether the agency substantially complied with its statutory and regulatory procedures, whether its factual determinations were supported by substantial evidence, and whether its action was arbitrary, capricious or an abuse of discretion."[118]

The court found ample evidence to support the agency's action and its finding that Singer's conduct adversely affected service efficiency because he had flaunted his homosexuality at his prior place of employment, he identified himself as a government employee in extensive media coverage and publications regarding a Gay symposium, and he received extensive media coverage as a result of his attempt to marry another male. Thus, Singer's open and notorious homosexual conduct, coupled with his public display of

116. 530 F.2d 247 (9th Cir. 1976), *vacated,* 429 U.S. 1034 (1977).
117. 429 F.2d 1332, 1334 (9th Cir. 1970).
118. 530 F.2d at 251 (footnote omitted).

such conduct and his advocacy of homosexual conduct while identifying himself as a federal employee provided a rational nexus for the agency's action.[119]

The federal judiciary's conclusion that Fifth Amendment due process requires a nexus between homosexual status or conduct and job performance or service efficiency permits employees to seek relief on two bases. The first, applicable to many tenured employees, is that external sources defining their employment rights violate due process by failing to require the appropriate nexus. Such arguments may be grounded on vagueness or overbreadth.[120] The second basis, primarily useful to probationers and applicants, is a direct due process attack on employer or agency action. The argument posited is that failure to hire or dismissal based *solely* on homosexual status or conduct is arbitrary or capricious.[121]

In the federal sector, then, a statute or regulation which carries a blanket prohibition on employment of homosexuals will normally fall due to its overbreadth. Similarly, where regulations do not expressly prohibit employment of homosexuals, but an agency interprets regulations or policy permitting adverse employment action on general bases, such as immorality, to permit or require adverse action *solely* on the basis of homosexual status or conduct, there is a due process violation.

Judicial construction of similar public personnel issues in the state sector parallels this federal sector analysis of due process. As previously noted in the context of property rights, the state statutes or regulations are subject to due process attack for failure to require a nexus between homosexual status or conduct and job performance.[122] When faced with a due process attack on a regulation governing dismissal of tenured employees or those with some type of contract, the court may take either of two courses of action. In *Morrison*, the court implied a nexus requirement in the regulation to supply the necessary specificity encompassing only unprotected activity, thus construing the regulation in a manner conso-

119. *Id.* at 255.

120. *See, e.g.*, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

121. *See, e.g.*, Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973).

122. *See, e.g.*, Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp 254 (D. Or. 1973).

nant with Fourteenth Amendment due process.[123] In contrast, the court in *Burton* held the statute invalid because its terminology failed to require a nexus which, in effect, would have provided the necessary specificity while prohibiting an overly broad application of the statute.[124]

A due process attack aimed at an agency's decision may characterize that decision as arbitrary or capricious for one of the three reasons discussed by the First Circuit in *Drown v. Portsmouth School District*.[125] In egregious cases, the reason supporting dismissal may be trivial; or the school board's (or agency's) actions may be wholly unsupported by the facts; or the reason for dismissal may be "unrelated to the educational process [job assignment] or to working relationships within the educational institution" or agency.[126] Clearly, the *Drown* decision's first two facets employ a traditional substantive due process analysis, and the third facet entails the same rational nexus concept which is evident in federal sector cases.

Thus, when a state employee demonstrates that a regulation on its face or in its application lacks specificity, or has such a broad reach that it encompasses protected conduct, or has no safeguards against arbitrary or capricious decisions, the litigant can prevail.[127] At this point, the burden of proof shifts to the employer-agency to prove that a rational nexus exists between the agency's efficiency or employee's performance and the employee's or applicant's conduct or status.[128] Again, factors such as notoriety, criminality, impairment of working relationships important to the job function, or *actual* embarrassment affecting service efficiency may provide the requisite nexus.[129] If the employee prevails, he may be afforded relief in the nature of reinstatement if he is a tenured employee.[130] The individual who is not tenured may be af-

123. 1 Cal. 3d at 233 n.36, 461 P.2d at 389 n.36, 82 Cal. Rptr. at 189 n.36.

124. 353 F. Supp. at 255.

125. 451 F.2d 1106 (1st Cir. 1971).

126. *Id.* at 1108.

127. *E.g.*, Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254 (D. Or. 1973).

128. *E.g.*, Norton v. Macy, 417 F.2d at 1167; Morrison v. State Bd. of Educ., 1 Cal. 3d at 235, 461 P.2d at 391-92, 82 Cal. Rptr. at 191.

129. *See* notes 77 & 78 *supra*.

130. *E.g.*, Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

forded backpay and/or damages for breach of contract, but he will rarely, if ever, be reinstated.[131]

If the employee or applicant does not have employment or tenure rights defined by statute, regulation or contract, he may still assert that employer-agency action was arbitrary or capricious, thus violating the constitutional standard of due process, in a limited class of cases. The employee-applicant should attempt to demonstrate that the employer-agency dismissed him or refused to hire him without considering the individual facts of his case, acting instead pursuant to a policy of excluding all individuals who have homosexual propensities, or who identify with homosexuals or engage in any type of homosexual conduct. The courts have rather uniformly recognized such blanket exclusions as violative of due process.[132]

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131. *See* discussion in Burton v. Cascade School Dist. Union High School No. 5, 512 F.2d at 852-54. In his dissent, Circuit Judge Lumbard makes a persuasive case for reinstatement of all individuals dismissed for constitutionally infirm reasons. *Id.* at 854-56.

132. Whenever possible, state courts have declined to rule definitively on this issue. *See, e.g.*, Aumiller v. University of Del., 434 F. Supp. 1273, 1292 n.56 (D. Del. 1977): "The question of whether a homosexual professor employed at a university constitutionally can be dismissed or his contract nonrenewed solely because he is a homosexual has not been addressed specifically." *See also* Burton v. Cascade School Dist. Union High School No. 5, 512 F.2d at 854 n.5: "We do not address the question whether the school district could refuse to rehire appellant, or whether any other school system could refuse to give her a teaching position, solely on the basis of her homosexual inclinations." Safransky v. State Personnel Bd., 62 Wis. 2d at 1475, 215 N.W.2d at 385: "Likewise, the question of whether an individual may be terminated solely for his homosexual status is not an issue and need not be determined."

But, state courts have indicated constitutional infirmity with blanket exclusions in dicta. *Cf.* McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972), where the district court stated that: "[t]hough by current standards many persons characterize an homosexual as engaging in 'immoral conduct,' 'indecent' and 'disgraceful,' it seems clear that to justify dismissal from public employment, or as the court finds in this case to reject an applicant for public employment, it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality." 316 F. Supp. at 814.

The court of appeals, on the other hand, found "it is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct." 451 F.2d at 196.

*See also Acanfora v. Board of Educ.*, 359 F. Supp. 843, where the district court asserted: "[M]ere knowledge that a teacher is homosexual is not sufficient to justify transfer or dismissal." *Id.* at 856. But the court of appeals announced: "We hold, therefore, that Acanfora's public statements were protected by the first amendment and that they do not justify either the action taken by the school system or the dismissal of his suit." 491 F.2d at 501.

The assertion of due process violations based on homosexual status or conduct, where the state or federal government seeks to directly or indirectly classify individuals according to such criteria, is normally accompanied by the assertion of an equal protection violation. Utilizing section 1983, the applicant or non-tenured employee, as well as those with tenure, can validly assert an equal protection violation based on governmental statute, regulation or policy,[133] for adverse employment actions based on homosexual status or conduct. The court will judge the agency's action by one of two standards. If the litigant can establish that the classification on the basis of sexual preference in persuasion or conduct impinges a basic fundamental right is necessarily directed at a suspect group, the judiciary will strictly scrutinize the classification to determine whether the means utilized by the state actually further a compelling state interest with the least impact or intrusion on the fundamental right or the suspect group.[134] If the litigant is unable to prove that, as a homosexual, he is a member of a suspect group or that a fundamental right is involved, the court, employing the traditional standard of equal protection, will inquire only "[i]f the goals sought are legitimate, and the classification adopted is *rationally related* to the achievement of those goals."[135]

To fully understand the impact of equal protection on homosexual public employee cases, it is necessary to examine factors comprising suspect and non-suspect classifications, the homosexual's interest in public employment, the state interests that support classification based on homosexual status or conduct, and the constitutional rights which are or may be infringed by such a classification. Although the Supreme Court has not addressed classifications based on homosexuality in the context of employment, an argument can be advanced for treating classifications based on homosexual status or conduct as "suspect," or at least as "semi-suspect," meriting a heightened judicial scrutiny, which requires that: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial rela-

133. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 173 (1970).

134. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Williams v. Rhodes, 393 U.S. 23 (1968). The district court in Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), held that adult, private, consensual homosexual acts are protected. *Id.* at 852.

135. Richardson v. Belcher, 404 U.S. 78, 84 (1971) (emphasis added). *See also Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 669-71 (1975).

tion to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[136]

In *Frontiero v. Richardson*,[137] the Supreme Court discussed its rationale for finding sex to be a semi-suspect classification.

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . . " And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[138]

This reasoning is arguably applicable to classifications based on sexual preference.[139]

In addition, the groups which the Court has treated as suspect or semi-suspect classes have traditionally been the subject of private and governmental discrimination which has burdened them in such contexts as employment, education and legal status to contract.[140] Legislative classifications were often the result of stereotyped myths and/or attributes beyond the control of these individuals.[141]

In the Western world, homosexuals have been subjected to pervasive discrimination since Biblical times.[142] Until the 1960's, homosexuals could be denied federal employment solely on the ba-

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136. Reed v. Reed, 404 U.S. 71, 76 (1971); *see also* Craig v. Boren, 429 U.S. 190 (1976). This equal protection test, applied in sex discrimination cases, requires that the classification bear a substantial relationship to an important government interest. 404 U.S. at 76; 429 U.S. at 197. By comparison, the test applied in suspect class situations requires that a *compelling* state interest be shown. *See* note 134 *supra*.

137. 411 U.S. 677 (1973).

138. *Id.* at 686. *See also* Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975).

139. The court has yet to find discrimination based on sexual preference violative of the Fourteenth Amendment. *See, e.g.*, Enslin v. Bean, 565 F.2d 156 (4th Cir. 1977), *cert. denied*, 436 U.S. 912 (1978); Doe v. Commonwealth's Atty., 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976); Wainwright v. Stone, 478 F.2d 390 (5th Cir.), *rev'd per curiam*, 414 U.S. 21 (1973).

140. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

141. *See* Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973).

142. *Id.* at 576-77.

sis of that status.[143] Some states still maintain a policy of tacitly disapproving of employing homosexuals in such socially sensitive occupations as teaching, although other reasons may be offered as justification.[144] The myths surrounding homosexuals are legion and seriously detrimental to homosexual rights in employment. For example, they are considered by many to be pedophiles, thus posing a substantial threat to society. Yet, statistics clearly refute this and demonstrate, instead, that pedophiles are more likely to be heterosexuals.[145]

The medical profession has reached a consensus that homosexuality is not *per se* a psychological disorder, but no consensus exists as to the ability of an individual to control his homosexuality.[146] Divergent theories cite singular or composite causative factors of a biological, hormonal, environmental and psychological nature.[147] In the final analysis, the most certain fact is that too little is known to determine actual causation and to predict its relationship to an individual's ability to control his sexual preference. It is evident from recent studies that homosexuality cannot be "cured" in the vast majority of cases.[148] Thus, although the adult may choose to engage in homosexual conduct, it may be inferred that he does not choose his sexual preference.

Although the courts could reasonably conclude that classifications based on sexual preference are not suspect, the importance of the ability to practice one's profession and to obtain public sector employment may tip the balance of the scales in favor of at least heightened scrutiny of such classifications. This would parallel the type of analysis which has been utilized in sex discrimination cases.

The rejection of the right-privilege doctrine generated re-

143. *E.g.*, Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973).

144. *See* Note, *Homosexuals in the Teaching Profession*, 20 CLEV. ST. L. REV. 125 (1971).

145. Committee on Homosexual Offenses and Prostitution, Report, 45-46 (Am. ed. 1963) [hereinafter cited as Wolfenden Report]. *See also* Dr. Irving Bieber's comments in *Playboy Panel: Homosexuality*, PLAYBOY, Apr. 1971, at 88.

146. *See* I. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY (1962); A. KARLEN, SEXUALITY AND HOMOSEXUALITY (1971); Wolfenden Report, *supra* note 145.

147. For contrasting viewpoints see C. SOCARIDES, THE OVERT HOMOSEXUAL 22 (1968); SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY (J. Marmor ed. 1965); *A Letter from Freud*, 107 AM. J. PSYCH. 786 (1951).

148. *See* I. BIEBER, *supra* note 146, at 310-19; A. KARLEN, *supra* note 146, at 572-606.

newed interest in public employment as the Supreme Court stated that employment in the public sector cannot be subjected to unconstitutional conditions.[149] In the absence of an actual, vested property right to public employment, there remains the fundamental and constitutionally protected right to pursue a chosen occupation[150] and the liberty interest in pursuing government employment based on valid eligibility requirements.[151] "The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government."[152]

As a practical matter, the effect of disqualifying from public employment all individuals who have engaged in homosexual conduct would be to eliminate virtually 37% of the caucasian male population.[153] Simply excluding those individuals who are exclusively homosexual in orientation would eliminate upwards of three to four million Americans.[154] The reasons advanced for excluding this vast number of homosexuals from public employment include or may include the following: (1) homosexuals are subject to blackmail and may, therefore, compromise their job performance, service efficiency, or security; (2) homosexual conduct is criminalized in most states, and public policy does not favor employment of criminals; (3) homosexual conduct is immoral, unprofessional, or denotes acts involving moral turpitude, and public policy opposes employment of individuals who manifest such traits; (4) employment of homosexuals will result in the public's losing respect and confidence in the agency; (5) employment of homosexuals denotes tacit approval of homosexual conduct, and this is contrary to public policy as a frustration of the criminal statutes; (6) employment of homosexuals in the public sector, by denoting tacit approval of homosexual conduct, will increase the prevalence of such conduct; (7) homosexual status or conduct denotes a psychological disorder or imbalance; (8) employment of homosexuals will disrupt working

149. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

150. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

151. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

152. Scott v. Macy, 349 F.2d 182, 184 (D.C. Cir. 1965).

153. *See* A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650-51 (1948) [hereinafter cited as KINSEY REPORT].

154. *See* NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 4 (1969).

relationships by fostering homosexual affairs between co-workers or by creating resentment in heterosexual co-workers who are solicited by homosexuals. It is apparent from an examination of these concerns that all of them can be addressed without imposing a blanket prohibition on employment of homosexuals. In fact, a closer examination indicates that some of these objectives may not be legitimate.

The first objective is advanced in cases involving the federal government's security clearance program.[155] Even in the context of national security, the courts have recognized that the potential for blackmail does not justify blanket denial of security clearances (the ultimate effect of which may be dismissal from an agency or specific position) except in such limited contexts as CIA employment. Denial of a security clearance, whether an industrial or federal clearance, must be supported by a rational nexus linking the applicant's homosexuality to an inability to maintain national secrets.[156] For example, an individual who fears revelation of his homosexuality is, in fact, a candidate for blackmail. He can validly be denied a security clearance.[157] An individual who has no such fears and does not seek to hide his homosexuality is not subject to blackmail. Therefore, he cannot be denied a security clearance *solely* on the assumption that homosexuality renders him subject to blackmail.[158]

Objectives relevant to criminal statutes often fail to recognize three important practical matters. First, state laws penalize "homosexual" conduct between heterosexual, as well as homosexual, couples; yet, how many agencies inquire into the private sexual conduct of professed heterosexuals? From a legal standpoint, is their conduct any less criminal or reprehensible? Second, not all forms of homosexual conduct are criminal, as the court in *Morrison* aptly noted.[159] Third, statistics indicate there is, at best, a minimal and arbitrary enforcement of such laws.[160] Legally, the

155. *See, e.g.*, Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973), *amended concurring opinion*, 494 F.2d 1135 (D.C. Cir. 1974).

156. *See* Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973).

157. *E.g.*, McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973).

158. *See* note 155 and accompanying text *supra*.

159. 1 Cal. 3d at 218-19 n.4, 461 P.2d at 370 n.4, 82 Cal. Rptr. at 177-78 n.4.

160. *See* Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643 (1966).

constitutionality of laws regulating private, consensual sexual conduct between adults is dubious in light of the Supreme Court's recognition that a sphere of privacy surrounds the individual.[161] Clearly, the objectives relevant to state criminal statutes may be met by prohibiting employment of only those individuals who have criminal records for engaging in homosexual conduct for those jobs in which criminal conduct of this nature is demonstrably relevant to job performance.

As the *Morrison* Court recognized, morality is hardly a subject upon which consensus is possible. Although society's interest in promoting established norms of behavior must be accorded some weight, total deference to social norms is inconsistent with the concept of individual freedom and may impede the growth of both society and the individual.[162] A far more relevant standard for employment lies in the examination of the individual's conduct or status in relationship to the duties he and the agency must fulfill.[163] *Norton* made it clear, as did *Society for Individual Rights, Inc.*, that potential agency embarassment is an insufficient basis for excluding individuals from employment if they are otherwise qualified.[164]

What is probably the strongest fear of the general populace—that tacit approval of homosexuality will increase its occurrence—has been categorically proven groundless.[165]

Perhaps it is the ignorance which surrounds homosexuality that has, in the past, perpetuated distorted perspectives and permitted the medical profession to view homosexuality as an illness. As knowledge of the subject has increased, medical perspectives

161. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Schopler, *Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy*, Annot., 43 L. Ed. 2d 871 (1975).

162. As District Judge Young stated in Acanfora v. Board of Educ., 359 F. Supp. at 850-51: "As autonomous and rational beings, individuals are capable of reasoned decisions in pursuit of chosen goals. Given man's imperfect knowledge, full freedom of thought and association is imperative for individual self-development and social progress. So long as the freedoms of others are not affected, a government intended to promote the life, liberty and happiness of its citizens must abstain from interference with individual pursuits, no matter how unorthodox or repulsive to the majority."

163. 1 Cal. 3d at 220, 461 P.2d at 379, 82 Cal. Rptr. at 179.

164. 417 F.2d at 1167; *see also* Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. at 401.

165. *See* E. SCHUR, CRIMES WITHOUT VICTIMS 110-11 (1965); Wolfenden Report, *supra* note 145, at 47.

have changed. The psychiatric community does not recognize homosexuality *per se* as a disorder.[166] Although some homosexuals may be emotionally maladjusted, there are clearly many homosexuals who are well-adjusted individuals performing excellent tasks for their employers.[167] With legal recognition of these facts, this state objective appears to have lost its legitimacy.

Finally, disruption of working relationships is a valid and sufficient reason for dismissal, but blanket exclusions do not prevent this. They cannot guarantee that all homosexuals will be eliminated, nor do they eliminate the problem since heterosexual affairs may cause equal or greater disruption.[168]

Blanket employment policies levelled at permitting adverse action against homosexuals necessarily impact directly or indirectly on constitutional rights such as speech, association, belief and privacy. This leaves the homosexual faced with three equally objectionable and untenable choices: forego all public employment; secure public employment but forego any activities, associations or speech—including protected activities—which might reveal one's homosexuality; or "cure" his sexual persuasion to conform to social norms.

Utilizing even the least stringent equal protection standard, it is at least arguable that effectuation of the state's objectives previously delineated cannot pass constitutional muster when balanced against the effects of blanket exclusions. The federal sector has already recognized that exclusion of all homosexuals from any public position or specific positions, other than investigative agencies concerned with national security, would be so irrational as to be constitutionally infirm.[169] States confronted with equal protection arguments based on the blanket exclusion of homosexuals in the absence of proof of homosexual conduct related to job performance have also found these classifications constitutionally infirm.[170]

166. *See* notes 145-47 *supra.*

167. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

168. *See* Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912, 923 (1970).

169. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), discussed in notes 112-16 and accompanying text *supra.*

170. *See* note 124 *supra*; *contra,* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977).

Some courts addressing adverse employment actions directed at "practicing homosexuals" or those who have engaged in recent homosexual conduct have, likewise, held this classification invalid.[171]

Thus, the homosexual litigant may effectively challenge the legitimacy of the state's objectives or the irrationality of its classifications. The latter attack will find the agency particularly vulnerable if its decision is grounded on homosexual conduct in general, rather than a thorough assessment of the litigant's particular conduct.

In addition to attacks on constitutionally infirm standards violative of equal protection and due process, the homosexual public employee can assert that adverse employment actions impinge upon, or are taken in retaliation for, the exercise of such protected interests as speech, association or privacy.

## D. Speech and Association

> For at least a quarter-century this court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[172]

The unique aspect of public employment, which assumes a paramount role in First Amendment cases, is the dual role of both the employer and employee.[173] Where the state or federal government, in its role as sovereign, restrains First Amendment rights of its employee, in his role as a citizen, the government's actions are strictly scrutinized to determine whether a compelling governmental interest is furthered by restrictions of time, place and man-

171. *E.g.*, Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

172. Perry v. Sindermann, 408 U.S. at 597.

173. *See* Note, *The First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968).

ner.[174] When the government's actions as employer infringe upon First Amendment rights of employees, a different set of objectives underlie the governmental action and, accordingly, the judiciary will measure the government's action against a different standard.[175]

The Supreme Court, in *Pickering v. Board of Education,*[176] directed attention to the duality inherent in the public employment context.

> [I]t cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[177]

The government, as employer, can impose reasonable regulations on the exercise of the First Amendment rights of its employees which it may not impose on citizens in general. For example, while the citizenry in general may not be restricted in its exercise of partisan political activity, the public employee may constitutionally be prohibited from engaging in partisan political activities as a condition of continued or initial public employment under the Hatch Act[178] or a state equivalent.[179] Thus, a crucial determination in public employment cases where the homosexual litigant raises First Amendment issues is the role which the courts attribute to the employer and/or the employee.

In *Perry,* the Supreme Court held that a public employee without tenure or other protected status may raise First Amendment issues:

> [T]hus, the respondent's lack of a contractual or tenure "right" to reemployment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifi-

174. *E.g.,* Pickering v. Board of Educ., 391 U.S. 563 (1968).

175. *See, e.g.,* Kelley v. Johnson, 425 U.S. 238 (1976); East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838 (2d Cir. 1977).

176. 391 U.S. 563 (1968).

177. *Id.* at 568.

178. 5 U.S.C. § 7324 (1980). *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

179. *See generally* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

> cally held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights.[180]

Thus, in contrast to cases grounded on property interests, an employee's status in liberty interest cases is irrelevant to a determination on the merits. It will, however, impact on the issue of appropriate remedies.[181]

The homosexual litigant may contend that the terms of public employment as stated or as applied contain unconstitutional conditions that infringe upon or "chill" the exercise of First Amendment freedoms. Or, he may contend that he was subjected to adverse employment action in retaliation for exercising his First Amendment rights. In making a determination on the merits, the court will examine the role of the agency or employee, whether the activity is protected, and whether the agency's regulation rationally furthers a legitimate goal. In balancing the respective interests of the agency and the employee or applicant, the courts require a progressively lesser showing of governmental interest as the employee's activity progressively attenuates from pure speech toward pure conduct.[182]

In *Pickering,* the Supreme Court established the basic framework for an analysis of public employees' right to freedom of speech. Public criticism of the school board's allocation of funds and failure to adequately inform the citizenry of financial matters formed the basis for Pickering's dismissal. The Supreme Court found that the employee's public statements concerned matters of public concern, were made by the employee in the context of his role as a concerned citizen, and did not impede the employee's performance of duties or hamper the school's performance of its functions.[183] The Court concluded:

> [I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, . . . it is necessary to regard the teacher as the member of the general public he seeks to be.[184]

180. 408 U.S. at 597-98.
181. *See* note 44 *supra.*
182. *See* Note, *Symbolic Speech,* 43 FORDHAM L. REV. 590, 592-93 (1975).
183. 391 U.S. at 572-73.
184. *Id.* at 574.

The standard by which Pickering's speech was judged was that spawned by *New York Times Co. v. Sullivan*:[185] "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[186]

In a series of footnotes, the Court further defined the parameters of First Amendment rights in dismissal actions.[187] From these, it is apparent that dismissal or other adverse employment action is permissible if the speech either exceeds the scope of First Amendment protection in *New York Times*, is otherwise unprotected, or shows the employee is unfit to perform assigned duties.[188]

*McConnell v. Anderson*[189] is one of the first homosexual public employee cases to follow *Pickering*. In 1970, McConnell was selected to head the cataloging division at the St. Paul campus library of the University of Minnesota. The Board of Regents disapproved the appointment when McConnell's application for a marriage license to marry another man drew substantial publicity. McConnell filed suit under section 1983, contending that the university's action deprived him of due process, equal protection and, collaterally, the freedom of speech and expression. The district court granted an injunction.[190] It found that McConnell could not require the university to show cause given the absence of tenure rights or an employment contract. The court also noted that there were no university rules governing employment of homosexuals, that no information of a classified nature was involved in McConnell's position, that by virtue of his public admission of homosexuality, McConnell was not subject to blackmail and that the university did not allege that McConnell's competency as a librarian or performance of his duties would be adversely affected by homosexual tendencies. Further, there was no allegation that McConnell had engaged in sodomy or other homosexual activity proscribed by state criminal statutes. The court, therefore, based its determina-

185. 376 U.S. 254 (1964).

186. 391 U.S. at 574-75.

187. *Id.* at 570 n.3, 572 n.4, 573 n.5.

188. *See* Note, *supra* note 173.

189. 316 F. Supp. 809 (D. Minn. 1970), *rev'd* 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

190. 316 F. Supp. at 815.

tion on due process considerations.[191] The district court declined to determine whether McConnell's application for a marriage license constituted symbolic speech and whether the resultant termination of his employment thus constituted a denial of free expression under the First Amendment.[192]

The Eighth Circuit Court of Appeals reversed, noting that McConnell did not press his First Amendment claims.[193] In a footnote, the Eighth Circuit opined that McConnell's conduct in attempting to marry a male fell outside the bounds of symbolic speech protected in *Tinker v. Des Moines Independent School District.*[194]

Approximately two years after *McConnell,* another homosexual litigant brought an action under section 1983 to enjoin an adverse employment action infringing upon his freedom of speech. In *Acanfora v. Board of Education,*[195] a junior high school teacher contested his transfer from the classroom to a non-teaching position upon the school board's discovery of his homosexuality. Acanfora's problems stemmed from two incidents at Pennsylvania State University where, as a member and treasurer of the Homophiles, Acanfora was a named plaintiff in a legal action to compel campus recognition of the homosexual organization. During a press interview on this subject, Acanfora publicly acknowledged his homosexuality. Acanfora was suspended during his student teaching assignment for membership in the Homophiles, but he was reinstated and satisfactorily completed the assignment after initiating legal action. His certification to teach in Pennsylvania was pending review by the Secretary of Education after a six member panel split on the issue of good moral character.

To prevent further interference with his teaching career, Acanfora intentionally failed to disclose his homosexuality and participation in Homophiles during interviews and on official job applications. Acanfora was awarded a one year contract by the Montgomery Board of Education to teach Earth Sciences. After a month of satisfactory performance, Acanfora was transferred to a

191. *Id.* at 812, 815.

192. *Id.* at 815.

193. 451 F.2d at 196 n.7.

194. *Id.* (citing Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969)).

195. 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).

non-teaching position pending investigation. This move was precipitated by news reports in the *New York Times* and *Washington Post* which discussed a news conference by the Pennsylvania Secretary of Education to announce his decision to grant Acanfora's certificate to teach in that state.

Acanfora's transfer prompted reinstatement petitions from students and faculty members and inquiries from media representatives of local and national television, radio shows and newspapers. Acanfora accepted these offers to appear and discuss the circumstances of his lawsuit and the difficulties homosexuals encounter. Additionally, Acanfora became a member and delegate of the National Education Association's gay caucus and attended meetings of the Washington Gay Activists Alliance.

The district court analyzed Acanfora's contentions of constitutional deprivation in terms of privacy, equal protection, due process and the rights of association and speech. After finding a protectable interest in private, consensual adult homosexuality, the court found a correlative First Amendment right to "public speech, organization and assembly in support of that goal by ordinary citizens."[196] The district court characterized promotion of legal rights for homosexuals as political activity encompassed within the First Amendment.[197]

As with other fundamental interests, the court recognized that this right was not absolute: "Indeed, freedom of speech is subject to reasonable regulation as to time, manner and place; and speech which is 'inseparable' from action does not enjoy the same degree of protectability."[198]

The problem confronting the district court was two-fold. First, there was a need to define the parameters of First Amendment protected activity as related to Acanfora's speech and association. Second, assuming a finding of protected activity, there was a need to balance the interests of Acanfora against those of the school board to determine whether the transfer was a reasonable employer regulation of otherwise protected activity. The district court treated Acanfora's pre-transfer associations and publicity as pro-

196. 359 F. Supp. at 854.
197. *Id.* at 856.
198. *Id.* at 855.

tected activity.[199] The court determined that Acanfora had, as a citizen, protectable interests in public speech, organization and assembly in support of socio-political goals of homosexuals.[200] But, as an employee in a special position of trust, Acanfora had a concomitant duty to maintain a degree of privacy in the conduct of his private life.[201] Acanfora also had a personal right to defend the attack on his reputation or fitness to teach which transfer from the classroom necessarily implied.[202] In contrast, the Board of Education had "an interest in the regulation of activity detrimental to the educational process"[203] and could, therefore, impose reasonable regulations on the time, place and manner of exercising First Amendment rights.[204]

Acanfora's post-transfer activity was held to be unprotected because the time, place and manner of occurrence exceeded the bounds of propriety and necessity and adversely affected the educational process.[205] The standard under which the court made this determination was "whether the speech is likely to incite or produce imminent effects deleterious to the educational process."[206]

On appeal, the Fourth Circuit Court of Appeals affirmed the district court on different grounds.[207] The court specifically rejected the standard formulated by the district court and held that Acanfora's public statements were protected under the doctrine enunciated in *Pickering*.

> [T]he Court has ruled that a teacher's comments on public issues concerning schools that are neither knowingly false nor made in reckless disregard of the truth afford no ground for dismissal

199. *Id.* at 854.
200. *Id.* at 854, 856.
201. *Id.* at 855.
202. *Id.* at 857.
203. *Id.* at 855.
204. *Id.*
205. *Id.* at 857.
206. *Id.* at 856.
207. 491 F.2d 498, 499 (4th Cir. 1974). The court denied relief on the basis that Acanfora certified the accuracy of his job application with full knowledge of the significant omission of his participation in the Homophiles as an extra-curricular activity. "This intentional withholding of facts about his affiliation with the Homophiles is inextricably linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers. Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considered to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid." *Id.* at 504.

> when they do not impair the teacher's performance of his duties or interfere with the operation of the schools. . . . Acanfora's public statements must be judged by these constitutional principles, and not, as the district court suggested, by the common law doctrine of self-defense to defamation.
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> . . . .
>
> . . . There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the first amendment and that they do not justify either the action taken by the school system or the dismissal of his suit.[208]

Another case involving the manner and place of exercising First Amendment rights is *Safransky v. State Personnel Board.*[209] A tenured employee was dismissed for cause from his position as counselor to adolescent boys in a mental institution. The employee was a self-avowed homosexual who engaged in discussions of his homosexual lifestyle and practices in the presence of co-workers and patients. His conduct included calling a co-worker a "lesbian," arriving adorned in women's make-up, commenting that specific patients would make good "drag queens," and squeezing the leg of another male co-worker.[210]

The court declined to discuss Safransky's claim that his off-duty association with other homosexuals was constitutionally protected since his dismissal was predicated solely on speech and conduct occurring on the job.[211] The court held that Safransky's right of free speech was not violated.[212] It found substantial evidence that Safransky, by his conduct, was unfit to perform his duties since his actions adversely affected patient's welfare and disrupted his relationship with co-workers.[213]

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208. *Id.* at 500-01 (citations omitted).

209. 62 Wis. 2d 464, 215 N.W.2d 379 (1974).

210. *Id.* at 468-69, 215 N.W.2d at 384-85.

211. *See* note 132 *supra.*

212. "[D]espite the fact that defendant's actions came within the general area protected by the First Amendment, the fact that he chose to exercise that right in a mental ward excepted his conduct from constitutional protection.

"Defendant's conduct might be tolerated under different circumstances such as a confrontation on a public street. It cannot be tolerated in a mental hospital ward in the presence of numerous patients." 62 Wis. 2d at 478, 215 N.W.2d at 385 (quoting State v. Elson, 60 Wis. 2d 54, 61, 208 N.W.2d 363, 367 (1973).

213. 62 Wis. 2d at 478, 215 N.W.2d at 385.

Adverse employment action short of dismissal may also raise First Amendment issues. In *Gish v. Board of Education,*[214] the Board of Education directed a tenured teacher to undergo psychiatric evaluation as a result of his activities in support of gay rights. In June of 1972, Gish became president of the New Jersey Gay Activists Alliance. He promoted the alliance through public media communication and aided in organizing a gay caucus at a National Education Association Convention. The Board's directive was issued after consultation with the Board's psychiatrist who opined that Gish's overt, public behavior might endanger the psychological well-being of his students. Gish contended that compliance with the Board's directive had a chilling effect on his rights of association and speech.

Gish's contention was rejected by the court, which found that any impingement of his rights was *de minimus.* On balance, the Board's interest was substantial and the narrow impact of its regulation reasonable.

> The board does not question the right to Gish to say or to do any of the things which are mentioned in the statement of reasons. It simply contends that, as it has determined with the supportive corroboration of two psychiatrists, Gish's actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with the students.
>
> . . . .
>
> The submission by Gish to a psychiatric examination takes nothing from his [sic] except his time. His status as a teacher continues with full rights under the law. Therefore, from the standpoint of his being deprived of a right or privilege it is minimal, except as it may loom in his mind.[215]

The case which provides the most extensive analysis of First Amendment issues which a homosexual public employee can assert under section 1983 is *Aumiller v. University of Delaware.*[216] Aumiller was a non-tenured university lecturer who taught one course, directed the theater, supervised the Summer Festival of the Arts and managed the Performing Arts Series. After his second year in this capacity, the university declined to renew his contract,

214. 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied.,* 434 U.S. 879 (1976).
215. *Id.* at 104, 107, 366 A.2d at 1341-42, 1343.
216. 434 F. Supp. 1273 (D. Del. 1977).

primarily because he made public statements about homosexuality which appeared in three newspaper articles.

Two university officials were aware of Aumiller's homosexuality when he was hired. As a graduate student, he had joined the Gay Community, a homophile organization officially recognized by the university. After he was hired, Aumiller accepted the Gay Community's invitation to serve as faculty advisor. In July of 1975, an article quoting statements by Aumiller and excerpts from a letter he wrote in his capacity as faculty adviser appeared in a local newspaper, the *Sunday Bullentin.* University officials were concerned that Aumiller's private life not be publicized in a manner embarrassing to the university but this concern was not communicated to Aumiller. He was rehired for a second year.

Another reporter contacted Aumiller to obtain information for an article headlining the Gay Community. Photographs of Aumiller were taken at the university theater during a play rehearsal. During the same month, two reporters from the campus newspaper contacted Aumiller for interviews regarding a two-part article on the Gay Community.

The president of the university expressed concern over the second newspaper article, Aumiller's homosexual evangelism, and the potential embarrassment to the university.[217] A month later, he refused to renew Aumiller's contract on the ground that Aumiller advocated a homosexual lifestyle for students,[218] and used his faculty position to expound his viewpoint.[219]

Aumiller alleged a violation of his rights of free expression and association. The court agreed that the newspaper articles precipitated the University's decision not to renew Aumiller's contract and proceeded to examine what limitations the university could impose on employees' exercise of First Amendment rights in light of *Pickering.*

> Where the statements can be shown or presumed to impede the teacher's proper performance of his daily duties in the classroom; to have substantially disrupted the regular operation of the school generally; to have violated an express need for confidentiality, or where "the relationship between superior and subordinate is of

217. *Id.* at 1284.
218. *Id.* at 1285.
219. *Id.*

> such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship," the interest of the school administration in limiting the teachers' contribution to public debate generally will outweigh the individual teacher's interest in commenting upon matters of public concern. However, where none of these enumerated factors is present, the Court indicated that the interest of the state is not significantly greater than its interest in limiting a similar contribution by any member of the general public, and absent proof of false statements knowingly or recklessly made by the teacher, a teacher's exercise of his right to speak out on issues of public importance may not furnish the basis for his dismissal from public employment.[220]

As in *Pickering,* Aumiller's statements neither impeded his job performance nor resulted in a breach of confidence or a substantial disruption of working relationships or university functioning.[221] Since none of the *Pickering* limitations applied, the court concluded that:

> [T]he interests of the University in regulating Aumiller's right of free speech are no greater than the interest of the State in regulating any citizen's free speech. Accordingly, only if the defendants can show that Aumiller willfully or recklessly made false statements can they prevail on the question of whether their actions violated Aumiller's right to freedom of expression.[222]

The University had alleged that Aumiller had recklessly created the impression he was acting as a university spokesman in expressing his views to reporters. The court found that the identification of Aumiller by his official title and as a faculty adviser coupled with his failure to disclaim specifically he was speaking in an official capacity did not meet *Pickering's* recklessness standard.[223]

The defendants also alleged that Aumiller intentionally or recklessly made false statements to one reporter. The first statement was that university officials knew he was homosexual when they hired him, and the second statement implied that one of Gay Community's purposes was to help members find sex partners. The court found a legitimate misunderstanding between Aumiller and a

220. *Id.* at 1292-93 (citations & footnote omitted).
221. *Id.*
222. *Id.* at 1294-95.
223. *Id.* at 1295 n.68, 1296-97 nn.70-73.

reporter concerning the specific individuals who knew of Aumiller's status. The second statement, because it was taken out of context, did not rise to the level of recklessness.[224]

Defendants' third allegation was that Aumiller utilized his university office and the theater to advance his personal cause and, thereby, create an impression of university endorsement of a homosexual lifestyle. The court found that Aumiller's action in this regard was consistent with his position as a faculty adviser and did not contravene university policies.[225] Finally, the defendants contended Aumiller had an offensive sign in his office which read "The most difficult step is often the most rewarding—The Gay Community"; the court found this to be protected expression which the university had no substantial interest in removing.[226]

The court concluded that the university's decision not to renew Aumiller's contract was in retaliation for his protected public statements about homosexuality and thus in violation of Aumiller's First Amendment rights.[227]

Defendants countered this finding with the argument that Aumiller's living arrangement—sharing a house with two students, one of whom was a homosexual—provided an independent basis for non-renewal of his contract.[228] This information was held not to vitiate the constitutional violation.[229] According to the Supreme Court's decision in *Mt. Healthy City School District v. Doyle*,[230] the existence of a collateral justification for the non-renewal was relevant to the *remedial* phase of the litigation rather than a determination on the merits.[231]

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224. *Id.* at 1297-98.

225. *Id.* at 1298-99.

226. *Id.* at 1299-1300.

227. *Id.* at 1302.

228. *Id.* at 1302-04. Defendants interposed two additional defenses: that a tight budget would have required elimination of Aumiller's position, and that the University's need to conduct an affirmative action search would have accorded Aumiller a nonpreferential applicant status. The court found the evidence in support of these contentions at best speculative, and ordered Aumiller's reinstatement for the 1976-77 term since he would have occupied that position but for the unconstitutional conduct of defendants. *Id.* at 1308.

229. *Id.* at 1303.

230. 429 U.S. 274 (1977).

231. "[O]nce a plaintiff has shown that his conduct was constitutionally protected and was a motivating factor in the defendants' decision not to rehire him, then defendants can limit plaintiff's remedy by demonstrating by a preponderance of the evidence that they would have reached the same decision even in the absence of the violation of the protected right. If this burden is satisfied, the Supreme Court indicated that the plaintiff would not be

The defendants were unable to establish by a preponderance of the evidence that Aumiller would not have been rehired because of his living arrangements;[232] there was no evidence of a sexual relationship between any of the roommates and, therefore, no faculty-student sexual relations could be established.[233]

The court therefore ordered all references to the incident and lawsuit expunged from Aumiller's record at the university[234] and awarded him compensatory and punitive damages.[235]

## E. Peripheral Versus Core Rights

It is apparent from the foregoing cases that First Amendment interests may be successfully asserted by homosexual litigants. However, the likelihood of success will in large measure be determined by the court's analysis of three factors: (1) the type of First Amendment activity involved; (2) the employee's role—whether an employee or a citizen—in performing the specific activity; and (3) the relationship of the employer's proscription to the employee's particular job or position.

The employee's activity, regardless of where it appears on the spectrum between pure speech and pure conduct, must be protected. In the context of homosexual employees, the most frequently asserted bases for denying First Amendment protection are probably criminality and obscenity. Several courts have recognized criminal homosexual conduct as a justifiable basis for adverse employment action.[236] Although the homosexual-obscenity

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entitled to reinstatement as a remedy. The purpose of the remedy in such a context is to restore the plaintiff to the position he would have been in but for the constitutional violation, but not to place him in a better position than if no violation had occurred." 434 F. Supp. at 1303.

232. *Id.*

233. *Id.* at 1304 n.89.

234. *Id.* at 1309, 1313.

235. *Id.* at 1309-13. The punitive damages were awarded as to defendant Trabant only.

236. *See, e.g.*, Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972) (revocation of teaching certificate).

"A major distinction between the instant case and the *Morrison* situation is that the conduct engaged in by appellant was criminal. . . .

. . . .

"The criminal conduct of appellant is very similar to that which was involved in *Sarac* . . . , wherein this court sustained the revocation of the teaching credential of a teacher who had been convicted on a charge of disorderly conduct arising out of his homosexual advances toward a police officer on a public beach. Although some of the dicta in

cases are outside the scope of the article, public employment cases such as *Weissbaum v. Hannon*[237] do suggest that dismissal and other adverse employment action will be successful where the activity is clearly obscene.

It is also important to determine where the activity involved lies on the speech-conduct spectrum. As illustrated by *Acanfora* and *Aumiller,* pure speech is accorded substantial protection and any employer regulation restricting it will be examined very carefully. Pure association has not been addressed in the context of a homosexual public employee case. However, the Supreme Court, in *Shelton v. Tucker,*[238] stated that the right of association is "closely allied to freedom of speech and . . . like free speech, lies at the foundation of a free society."[239]

In addition, a substantial number of campus recognition cases have upheld the right of homosexuals to associate for political or social reasons.[240] Even in states proscribing homosexual conduct, the courts recognize associational rights and eschew allegations that mere association raises the presumption that illegal conduct is afoot or that the objective of such association is to engage in proscribed activity.[241]

As the First Amendment activity attenuates from the core or fundamental rights of pure speech and association toward peripheral rights involving free expression and protected conduct, the employer's burden of establishing his freedom to regulate the activity also attenuates. Association of homosexuals may be equivalent to assembly when it involves the goal of petitioning for legal or legislative reform. This was indicated by the district court

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*Sarac* was disapproved in *Morrison,* the decision was undisturbed in its essential holding that the evidence of homosexual behavior in a public place constituted sufficient proof of unfitness for service in the public school system." *Id.* at 990-92, 101 Cal. Rptr. at 88 (citation omitted). *See generally* Sarac v. State Bd. of Educ., 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967) (revocation of teaching certificate after conviction for public homosexual conduct).

237. 439 F. Supp. 873 (N.D. Ill. 1977).

238. 364 U.S. 479 (1960).

239. *Id.* at 486. *See also* De Jonge v. Oregon, 299 U.S. 353 (1937).

240. *See* Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080, *rehearing denied,* 435 U.S. 981 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974); Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972).

241. *See* Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976). This same conclusion was reached in the context of heterosexual conduct involving a teacher in Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd,* 476 F.2d 375 (8th Cir. 1973).

in *Acanfora.*[242] Or association may, as in the context of the campus recognition cases, involve membership in a group as a means of expressing one's philosophy or attitude.[243] This communicative conduct was at issue in *McConnell* and *Singer.*

McConnell's claim that his attempt to marry a male was symbolic speech was, in dicta, rejected by the Eighth Circuit Court of Appeals,[244] thus leaving the employer's disciplinary action to be judged by a lesser standard than that applicable to cases involving communicative conduct. *Singer* involved essentially the same conduct and outcome in the federal sector.[245]

As the Supreme Court has indicated in *Kelley v. Johnson*[246] and *Quinn v. Muscare,*[247] peripheral First Amendment rights of public employees may be curtailed more sharply than core rights, and the employer's justification for the regulation of peripheral rights may be less substantial than that needed to support regulation of core rights. The Supreme Court upheld the police force hair-length regulation in *Kelley,* and upheld another grooming regulation in a similar context in *Quinn.*

The Court in *Kelley* stated:

> More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. . . . If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.[248]

Closely allied to the Court's analysis of the type of activity involved and the permissible sweep of employer regulations is its analysis of the employee's role while engaging in the activity. As in *Kelley,* employer regulations touching the employee as an employee may cut a much broader path than those which affect the

242. *See* note 197 and accompanying text *supra.*

243. *E.g.,* NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

244. 451 F.2d at 196 n.7.

245. 530 F.2d at 256.

246. 425 U.S. 238 (1976).

247. 425 U.S. 560 (1976).

248. 425 U.S. at 245 (citations omitted).

employee as a citizen.[249]

The employer can most easily justify and apply regulations which are directed at pure conduct, as demonstrated by the Supreme Court's upholding of Hatch Acts.[250] The Hatch Act cases involve legislation aimed at specific types of partisan activity which history has demonstrated have an adverse effect on the efficiency of the service and the public's perception of agency action. Although such acts have the potential for application to otherwise protected activities, the Supreme Court has indicated a willingness to deal with these intrusions on an *ad hoc* basis.[251] It appears, then, that employer regulations which regulate or prohibit employee homosexual conduct and secondarily impact on core First Amendment rights may be upheld if there is actual evidence that such conduct affects the integrity of the employer-agency. For example, in *Safransky*,[252] the employer's dismissal of Safransky was held to be proper in light of Safransky's homosexual conduct while on the job. In contrast, in *Norton*,[253] off-duty homosexual conduct was held not to constitute an adequate basis for dismissal since the conduct did not affect the integrity of the employer-agency. What distinguishes the two cases is that in the former the employer sought to regulate employee conduct while on the job, whereas in the latter the employer sought to regulate the conduct of the employee in his off-duty role as citizen.

In both *Aumiller* and *Acanfora*, the employer tried to regulate the speech of the employees who were, like Pickering, speaking as individuals of the general public. Thus, the employers were held to a higher standard of justification than are employers seeking to regulate either an employee's exercise of a First Amendment right in his role as an employee or an employee's exercise of a peripheral First Amendment right.

These distinctions aside, the right of the individual to associate with others of his or her choice may emanate from the sphere of privacy which the Supreme Court has recognized as a funda-

249. *Id.* at 245, 248.

250. *See* notes 178-79 and accompanying text *supra*.

251. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973).

252. *See* notes 209-13 and accompanying text *supra*.

253. *See* notes 21-41 and accompanying text *supra*.

mental right.[254] Accordingly, these overlapping First Amendment rights may also be subsumed by a protected interest in privacy.

## F. Privacy

In his dissent in *Olmstead v. United States*,[255] Justice Brandeis said of the right to privacy: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights of man and the right most valued by civilized men."[256]

As with First Amendment rights, the right of privacy is a fundamental right.[257] Unlike the rights specifically enumerated in the Bill of Rights, however, privacy is a nebulous right with ill-defined parameters. The source of this right to privacy has, in various contexts, been deemed to be the unenumerated rights of the Ninth Amendment,[258] rights implicit in the guarantee of freedom in the Fourteenth Amendment,[259] and the penumbra surrounding one or more of the protected interests specifically enumerated in the Bill of Rights.[260] An example of the latter is the peripheral First Amendment right to privacy in one's associations which the Supreme Court recognized in *NAACP v. Button*.[261]

Parameters of the evolving right to privacy are designated zones or areas of privacy. Thus far, the Supreme Court has recognized zones of privacy relative to specific places,[262] intimate, protected relationships,[263] and fundamental rights that are implicit in individual autonomy,[264] such as the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.[265]

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254. *See, e.g.*, Roe v. Wade, 410 U.S. 113, *rehearing denied*, 410 U.S. 959 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

255. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

256. *Id.* at 478.

257. *E.g.*, Stanley v. Georgia, 394 U.S. 557 (1969).

258. Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., with Brennan, J., concurring).

259. *Id.* at 502-07 (White, J., concurring).

260. *Id.* at 484.

261. 371 U.S. 415 (1963).

262. *Id.*

263. Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973). *See also id.* at 66 n.13.

264. Griswold v. Connecticut, 381 U.S. 479 (1965).

265. *See id.*; Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

Although the right of privacy is not absolute, the government cannot intrude upon these protected zones absent a compelling state interest.[266] The government, as employer, may not condition employment on a waiver of the right to privacy; however, it can burden this right to a greater extent than can the government. When the government is the employer, however, the courts require a rational nexus between the government employment policies and job performance.[267]

For example, in *Mindel v. United States Civil Service Commission,*[268] a postal clerk was terminated for immoral conduct because he was living with a woman without the benefit of marriage. The postal clerk, Mindel, alleged that his termination violated due process and his right to privacy. The Court concluded that Mindel's right of privacy had been violated: "The government cannot condition employment on the waiver of a constitutional right . . . even in cases where it has a legitimate interest, it may not invade 'the sanctity of a man's home and the privacies of life.' "[269]

Likewise, in *Gayer v. Laird,*[270] the district court held that "[i]n normal circumstances, there is a right under the First Amendment for an individual to keep private the details of his sex life, and this applies to homosexuals, professed or otherwise."[271] The appellate court affirmed the district court holding not on First Amendment grounds, but because an executive order expressed a policy of deference to individuals' rights of privacy.[272]

Applying these holdings to the homosexual employment context, although the federal government may elicit information from its employees or applicants regarding their homosexual contacts, questions must be limited to information reasonably necessary to make an employment determination based on specific criteria formulated by the employer-agency.[273]

Relying on federal sector cases, the court in *Morrison* recognized the balance betwen regulations permitting adverse employ-

266. *See* notes 257 & 263-65 *supra.*
267. 417 F.2d at 1165.
268. 312 F. Supp. 485 (N.D. Ca. 1970).
269. *Id.* at 488 (citations omitted).
270. 332 F. Supp. 169 (D.D.C. 1971).
271. *Id.* at 171.
272. Gayer v. Schlesinger, 490 F.2d 740, 751 (D.C. Cir. 1973).
273. *Id.* (*citing* Scott v. Macy, 402 F.2d at 648).

ment actions for "immorality" and potential privacy invasions by probing employers.[274] To avoid such potentially intrusive practices, the court implied a nexus requirement in the regulation governing license revocation: "By limiting the application of that section to conduct shown to indicate unfitness to teach, we substantially reduce the incentive to inquire into the private lives of otherwise sound and competent teachers."[275]

The nexus requirement assures both that the employer's due process and the employee's right of privacy will remain intact.

> "The right of practice one's profession is sufficiently precious to surround it with a panoply of legal protection" . . . , and terms such as "immoral," "unprofessional," and "moral turpitude" constitute only lingual abstractions until applied to a specific occupation and given content by reference to fitness for the performance of that vocation.
>
> The power of the state to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job, as he deems fit.[276]

The district court in *Fisher v. Snyder*[277] agreed that a zone of privacy, emanating from the First Amendment, exists in one's home. Fisher's teaching contract was determined to have been impermissibly terminated when the school board inferred impropriety from her allowing men to stay at her apartment overnight. Relying on the Supreme Court's recognition of the right to privacy in one's associations, Chief Judge Urbom concluded "that the association of persons within one's home is an activity constitutionally protected within the meaning of the right of privacy."[278]

Not all courts agree. In *Hollenbaugh v. Carnegie Free Library*,[279] for example, the district court upheld dismissal of two employees, one of whom was pregnant, for living together in "open adultery." Despite Supreme Court decisions concerning the right of privacy, the district court concluded that:

> [n]othing . . . in these decisions concerning the right of privacy, intimates that there is any "fundamental" privacy right "implicit

274. 1 Cal. 3d at 233, 461 P.2d at 390, 82 Cal. Rptr. at 190.
275. *Id.* at 234, 461 P.2d at 390-91, 82 Cal. Rptr. at 190-91.
276. *Id.* at 239, 461 P.2d at 394, 82 Cal. Rptr. at 194 (citation omitted).
277. 346 F. Supp. 396 (D. Neb. 1972).
278. *Id.* at 400.
279. 436 F. Supp. 1328 (W.D. Pa. 1977).

> in the concept of ordered liberty" for two persons, one of whom is married, to live together under the circumstances of this case. We conclude, therefore, that plaintiffs' discharges were not violative of their constitutional right of privacy.[280]

The court's failure to find a privacy right in *Hollenbaugh* may be attributable to the criminality of the conduct/relationship of the parties, although the court did not specify a basis for finding no right of privacy.

Criminal proscription of specific sexual conduct should not, however, foreclose a finding that such conduct may, in some contexts, be protected by a right of privacy. Statutes proscribing adult, consensual homosexual acts, in private, are increasingly subjected to constitutional attack. States such as California and Washington have repealed such statutes.[281] Other states, like Texas and Alaska, have recognized potential constitutional infirmity in their sodomy statutes as applied to private, adult, consensual activity.[282]

In *Stanley v. Georgia,*[283] the Supreme Court recognized that proscribed activity in the privacy of one's home which imposes no threat of harm to the community, is protected by an independent right of privacy.[284] The District Court of Maryland applied such an analysis in *Acanfora* and concluded that:

> [T]he time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty.
>
> Great concepts like . . . "liberty" . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains

280. *Id.* at 1334.

281. *See, e.g.,* CAL. PENAL CODE §§ 286, 286.1, 288, 288a (1975); WASH. REV. CODE ANN. § 9.79.100 (*repealed* 1975).

282. *See, e.g.,* Wade v. Buchanan, 401 U.S. 989 (1971); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970); Harris v. State, 457 P.2d 638 (Alaska 1969). The *Harris* Court in dicta stated: "If the case at bar concerned private, consensual conduct with no visible impact upon other persons, at least some of us might perceive a right to privacy claim as one of the penumbral emanations of the Bill of Rights and 14th Amendment due process clause, or simply as one of the unenumerated rights guaranteed by the 9th Amendment." *Id.* at 648.

283. 394 U.S. 557 (1969).

284. *Id.* at 568.

unchanged. . . .[285]

The court, in dicta, found no compelling interest to support Maryland's proscription of private, adult, consensual homosexual activity and, by implication, found insufficient state-employer interest to warrant the sweeping infringment on privacy inherent in basing employment decisions on private homosexual conduct proscribed by the Maryland statute, since "homosexuality *per se* does not preclude successful job performance."[286]

In attempting to effectuate its interests, the employer often intrudes into the applicant's or employee's innermost beliefs, feelings and cherished relationships, as *Norton* and *Morrison* feared. With the increasingly burgeoning intrusion of government into the lives of its citizenry and the legislative recognition of the individual's need to preserve an enclave of privacy,[287] it is clearly time to recognize privacy in the conduct of the adult's private, consensual sexual practices as a fundamental right. Those states in which such conduct is no longer criminal have recognized that sexual conduct within one's sphere of privacy may not be inquired into by the government, because it has no legitimate interest.[288] Similarly, the employer has no legitimate interest in his employee's sexual conduct absent a nexus between the conduct and job performance.[289] Only by adherence to this standard can the individual's right to privacy in his associations be more than a hollow concept: "[U]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[290] This applies with equal force to the employer: *private* sexual conduct is not his business.

285. 359 F. Supp. at 851 (citations omitted).

286. *Id.* at 851. The district court concluded, however, that Acanfora exceeded the zone of privacy by virtue of his public statements. *Id.* at 856. The Fourth Circuit Court of Appeals affirmed on other, unrelated grounds. 491 F.2d at 499. The Fourth Circuit's only comment on the right of privacy, discussed at length in the lower court opinion, was in relation to Acanfora's omission of relevant information from his employment application. *Id.* at 501-04.

287. *Id.* at 856.

288. *See* Acanfora v. Board of Educ., 491 F.2d at 502.

289. 417 F.2d at 1165.

290. Wolfenden Report, *supra* note 145, at 148.

## Conclusion

> [D]iscrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses.[291]

Discrimination in employment is particularly odious when practiced by public employers, because the general public must of necessity support such discrimination. Ever-increasing reliance on government agencies renders it impossible to boycott government services in order to pressure agencies into nondiscriminatory employment practices. Moreover, government employment opportunities constitute a substantial segment of jobs within the employment sector of this society, particularly when the impact and quantity of government contracts are considered. For individuals highly trained in specialized areas, a foreclosure of public sector employment may effectively end their careers.

These effects taken together have a corollary effect on the government. Denial of employment to homosexuals circumscribes the pool of manpower resources from which the government seeks to lure quality employees. It negates the merit system principles which replace the archaic patronage system. In addition, public sector discrimination is incompatible with the government's dual role as the protectorate of constitutional principles.

The homosexual public employee can pursue his battle in the courts, as well as in the legislatures, to achieve equal employment opportunities in the public sector. In doing so, a vital tool exists in the Reconstruction Era Civil Rights Acts to preserve the integrity of constitutional guarantees. The homosexual public employee or applicant may assert as protected interests under section 1983 the same interests which would support a direct constitutional attack against employer-agency adverse action.

Prior to pursuing litigation, consideration should be directed towards several factors. First, the potential litigant should determine the remedy which he desires and then consider the alternative forums open to him. For example, removal of stigmatizing in-

291. Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970).

formation may be possible via a state-created mechanism which operates more quickly than the judicial process. Where reinstatement or backpay is desired, the litigant may find that a state constitution or laws are interpreted more liberally than the federal statute and therefore afford him a tactical advantage.[292]

A second factor the homosexual litigant must consider is his status as a protected or unprotected employee. He must familiarize himself with the regulations governing the terms of his employment and the scope of his substantive rights as defined by those provisions. In the absence of explicit provisions, the employee should determine whether a *de facto* system, as liberally described in *Ashton v. Civiletti*,[293] exists. If a regulatory system exists, but the agency's practice differs substantially and consistently from the regulatory scheme, the employee may be able to establish a *de facto* system, and estop the agency from asserting the regulatory scheme as a defense.

If the employee can establish no *de facto*, statutory, or contractual property right, his remedy will, in all likelihood, not include reinstatement.

The third factor the employee must consider is the on-duty or off-duty nature of his homosexual status, speech or conduct. Off-duty activity necessarily raises due process considerations, as well as the issue of infringement or chilling of rights to speech, association and privacy. Further, the employer may be acting as government-versus-employer and, thus, be held to a higher standard of justification by the courts. If the employee is being penalized for speech or status, due process and equal protection interests, as well as First Amendment rights, are affected. If conduct is at issue, the employee must determine the status of the criminal law and consider its effect on his case. To blunt the effectiveness of the employer's argument that conduct is violative of criminal laws and, hence, contrary to public policy, the employee should assert a privacy interest.

The strongest case a homosexual litigant can assert is one with the dual prongs of a property interest and a "pure" liberty interest. The courts necessarily keenly scrutinize employer regulations

292. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), *vacating* 65 Cal. App. 3d 608, 135 Cal. Rptr. 465.

293. 48 U.S.L.W. 2261 (Ct. App. D.C. Oct. 4, 1979).

curtailing the exercise of liberty. When a liberty interest is violated, the litigant's property interest will afford him a substantially greater measure of relief (especially if reinstatement is vital to him) than he could obtain for violation of either a property interest circumscribed by statute or a liberty interest.

But perhaps most importantly, the homosexual litigant should act with confidence:

> [T]he struggle of the homosexual community for equal rights, particulary in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities. . . .
>
> A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.[294]

294. Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 486, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979).